SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 212.

JOHN LOWE, APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

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STATEMENT OF THE CASE.

The appellant, immediately prior to the 11th day of December, 1900, was an officer of the Navy, formerly of the engineer corps, but transferred to the line with the rank of Captain under and by virtue of the "Navy Personnel act," so called, hereinafter mentioned. On that date he was retired under and by virtue of section 1444 of the Revised Statutes of the United States and section 11 of an act of Congress commonly called the "Navy Personnel act," approved March 3, 1899. He had been an officer of the Navy with a creditable record and had served during the Civil War, and therefore was an officer contemplated by section 11 of the "Personnel act."

The single question involved in this case is as to the pay to which appellant is entitled as an officer of the Navy re-

tired pursuant to section 11. This question arises in the following manner:

Congress, by section 7 of the "Personnel act," established and constituted the *active* list of the line of the Navy. So much of that section as is applicable to this controversy is as follows:

"That the active list of the line of the Navy as constituted by section 1 of this act shall be composed of: Eighteen Rear Admirals; seventy Captains; one hundred and twelve Commanders; one hundred and seventy Lieutenant Commanders; three hundred Lieutenants, and not more than a total of three hundred and fifty Lieutenants (junior grade) and Ensigns; *provided*, that each Rear Admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowances as are now allowed a Brigadier General in the Army."

Section 13 of the act provides that after June 30, 1899, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of the law for officers of corresponding rank in the Army. By section 1446 of the Revised Statutes of the United States, Rear Admirals of the Navy rank with Major Generals of the Army.

Section 11 of the "Personnel act" provides that any officer of the Navy with a creditable record who served during the Civil War shall, when retired, be retired with the rank and three-fourths sea pay of the next higher *grade*.

The appellant, being one of the officers embraced by section 11 of the act, by his retirement, having the rank of Captain on the active list, became therefore entitled to three-fourths sea pay of the next higher grade, or that of Rear Admiral. Instead, however, of receiving three-fourths of the sea pay of a Rear Admiral, or its equivalent, three-fourths of the pay of a Major General of the Army, the appellant has been and is receiving but three-fourths of the

pay of a Brigadier General of the Army, or three-fourths of the sea pay of a Rear Admiral of the nine lower numbers of the *grade*. The appellant thereupon made application to the Auditor for the Navy Department in the latter part of January, 1901, for the difference in pay between that which he was receiving and three-fourths of the pay of a Major General of the Army, this difference being $1,500 a year. This claim was refused by the Auditor (Rec., p. 3) on the authority of a decision of the Comptroller of the Treasury. On the 29th of June, 1901, the claimant appealed from the action of the Auditor for the Navy Department to the Comptroller, who sustained the Auditor, rendering a short opinion (Rec., p. 5). The Comptroller held that there were "two grades of pay for officers in the grade of Rear Admiral," and that therefore three-fourths of the next higher grade meant the next higher pay grade, or that of a Brigadier General in the Army (Rec., p. 5).

Thereupon the appellant brought suit in the Court of Claims for the difference between the pay he was receiving and that which he claimed he was entitled to receive, as above set forth. The Court of Claims found the facts substantially as has been stated, but sustained the views of the Comptroller of the Treasury that Admiral Lowe was not entitled to three-fourths of the pay of a Major General, because there were two *pay* grades in the grade of Rear Admiral; those grades of pay being created by the *proviso* in section 7 of the "Personnel act" above quoted.

The Court of Claims after delivering its opinion dismissed the petition (Rec., p. 11), and the claimant then appealed to this Court.

ASSIGNMENT OF ERRORS.

The Court of Claims erred—

1. In holding that the *proviso* in Section 7 of the Navy Personnel act providing "that each rear-admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowances as are now allowed a brigadier general in the Army," taken in connection with section eleven of that act, which provides "That any officer of the Navy with a creditable record, who served during the Civil War, shall when retired, be retired with the rank and three-fourths the sea pay of the next higher grade," applied to the appellant upon his retirement.

2. In holding that the above proviso, in section 7 of the Navy Personnel act, created a pay grade which constituted the "next higher grade" for pay purposes within the meaning of section eleven of the act above quoted.

3. In holding that three-fourths the sea pay of the "next higher grade" meant, when applied to the appellant, three-fourths the pay of a Brigadier General of the Army as provided for each of the nine lower numbers on the active list of the Navy in the above-mentioned *proviso* to section seven, above quoted.

4. In entering its judgment that the appellant's petition be dismissed and in dismissing the same.

ARGUMENT.

I.

THERE IS NO LANGUAGE IN THE SECTIONS OF THE NAVY "PERSONNEL ACT" APPLICABLE TO THIS CASE WHICH PROVIDES THAT OFFICERS OF THE NAVY WITH THE RANK OF CAPTAIN, WHO RETIRE WITH THE RANK AND THREE-FOURTHS SEA PAY OF THE NEXT HIGHER GRADE, ARE TO BE INCLUDED AMONG THE NINE LOWER NUMBERS OF THE ACTIVE LIST OF THE REAR ADMIRALS, OR THAT THERE IS A PAY GRADE FORMED BY THE NINE LOWER NUMBERS OF REAR ADMIRALS ON THE ACTIVE LIST WITHIN WHICH THE RETIRING OFFICERS ABOVE MENTIONED ARE TO BE INCLUDED.

As above shown, commissioned officers of the Navy, by section 13 of the "Personnel act," are to receive the same pay and allowances, except forage, as are or may be received by officers of corresponding rank in the Army. The pay of the *grade* of Rear Admiral equals the pay of a Major General in the Army. A careful reading of section 7 of the act discloses that the pay of the *grade* of Rear Admiral has not in any way been affected or taken from the operation of section 13. There is, however, a proviso in section 7 which is absolutely and clearly limited in its operation and effect. It provides that the *nine lower numbers* of the *grade*, to wit, the *grade* of Rear Admiral, shall receive the pay and allowance of a Brigadier General of the Army. This proviso refers only to a certain class of persons—that is to say, only the nine individuals having the nine lower numbers of the *grade* of Rear Admiral. If the proviso had named the persons who were to receive this stated pay, how could it be claimed that any other than those named should receive the compensation provided for? Not designating the indi-

vidual, however, by name, it does designate all those who may at any time occupy the places in the *grade* described by the words "nine lower numbers." How, then, can any person not being a Rear Admiral of the nine lower numbers of that grade come under the operation of the proviso and be required to accept the compensation therein mentioned?

The pay of the appellant as a retired officer is fixed by statute only. It is fixed by section 11 of the Personnel act. If we turn to section 11, we find there not a word or line which indicates that any officer of the rank of Captain and who has served during the Civil War shall, upon retiring with the rank of Rear Admiral, receive the pay of a Brigadier General. If it had been the intention of Congress that such should be the case, it may be safely presumed that that body would have added a proviso to section 11, providing that an officer retiring with the rank of Rear Admiral should receive three-fourths the pay of a Brigadier General. On the contrary, however, the rank and three-fourths of the sea pay of the next higher *grade*, but nothing more or less, is found in section 11. That being the case, and the pay of a Rear Admiral *as a grade* being provided for by section 13 as that of the corresponding rank in the Army, to wit, that of a Major General, it necessarily follows that the appellant, and all other officers with a creditable record who rank as Captain and retire from the active list, having served during the Civil War, must be entitled to three-fourths of the sea pay of the next higher grade, to wit, three-fourths of the pay of a Major General.

Again, it will be seen at a glance that section 7 constitutes the *number* of Rear Admirals who shall be upon the active list of the Navy, and that the proviso referring to the pay of the nine lower numbers of the grade must refer to the *active* list and to the active list only, because it applies to certain of the eighteen who are limited to the active list. There are no numbers on the retired list of the Navy, and if the contention of the defendant is to prevail, instead of there being

nine to receive the pay of a Brigadier General, as contemplated by the proviso, there would be many more than nine receiving the pay or three-fourths thereof. This state of affairs is beyond the meaning of any expression contained in the language of the proviso.

If Congress had contemplated the division into *two pay grades* for both the active and retired lists, it could have said so in express terms in the same manner as it had before spoken with reference to Lieutenants, for in section 7, in stating of what the active list of the Navy shall consist, it mentions a certain number of Lieutenants and a certain number of Lieutenants, "junior grade."

II.

WHERE THE MEANING OF A STATUTE IS PLAIN AND THERE IS NO AMBIGUITY IT IS THE DUTY OF THE COURTS TO ENFORCE IT ACCORDING TO ITS OBVIOUS TERMS AND NOT TO INSERT WORDS AND PHRASES SO AS TO INCORPORATE THEREIN A NEW AND DISTINCT PROVISION. THIS WELL-KNOWN PRINCIPLE OF CONSTRUCTION IS APPLICABLE TO THE SECTIONS OF THE PERSONNEL ACT UNDER CONSIDERATION.

A review of some of the principal cases decided by this court in support of the foregoing contention is now given, illustrating the applicability of the rule to the case at bar.

The constitution of the State of Colorado provided that—

"No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to wit: * * * " Here follows the rate of taxation. It then goes on, "and the aggregate *amount of indebtedness* of any county, for *all* purposes, exclusive of

debts contracted before the adoption of the constitution, shall not at any time exceed twice the amount above herein limited. * * * "

A suit was instituted against Lake county, in that State, upon a large number of county warrants issued for the ordinary county expenses, such as witnesses, and jurors' fees, etc. One of the defenses offered to the suit by the county was want of authority on the part of the county commissioners to issue the warrants in question. It was claimed that the provision of the State constitution above partially quoted from sustained the defense. The plaintiff below replied that this provision of the State constitution was not applicable to the warrants issued, being applicable only to debts created by loan for the purpose of erecting public buildings, etc., and that the above provision did not include or affect the loans for ordinary expenses of the county. In support of this interpretation the counsel for the defendant in error urged that the word "such" should be interpolated before the word "indebtedness" in the constitutional provision on the ground that it would then leave unlimited those necessary debts made without a loan and which are essential to county government and life.

Says the court (on page 673):

"In the light of these principles, expressed in the authorities quoted and in many others, we must decline to read the expression in section six, 'and the aggregate amount of indebtedness of any county, for all purposes,' etc., as if it were written 'and the aggregate amount of such indebtedness,' etc. This the defendant in error concedes to be necessary to his case. We see no admissible reason for the introduction of this restrictive word 'such' except to alter radically the plain meaning of the clause."

Lake County *vs.* Rollins (*130 U. S., 662, 673*).

In the following case the question arose as to whether an officer of the Army on the retired list was entitled to the increase of pay of 10 per cent. for each five years of service

which was allowed to officers on the active list. The statutes governing the case are sections 1262, 1263, 1274, and 1275 of the Revised Statutes, as follows:

"SEC. 1262. There shall be allowed and paid to each commissioned officer below the rank of Brigadier General, including Chaplains, and others having a similar rank or pay, ten per centum of their current yearly pay for each term of five years of service."

"SEC. 1263. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law."

"SEC. 1274. Officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired."

"SEC. 1275. Officers wholly retired from the service shall be entitled to receive, upon their retirement, one year's pay and allowances of the highest rank held by them, whether by staff or regimental commission, at the time of their retirement."

The court quoted from other sections of the Revised Statutes which named those who were *in the service* as Army officers, which included retired officers. After holding that an Army officer who was retired from active duty was still *in the service*, the court, construing section 1262 (above quoted), held that a retired officer was entitled to a 10 per centum increase of his current yearly pay for each five years of service, thus reading that section as it was written, and not introducing the word "active" before the word "service."

United States *vs.* Tyler (*105 U. S., 244*).

Another case directly in point is the following:

An officer of the Navy named Thornley brought suit against the United States to recover the balance of pay claimed to be due him by reason of the fact that he was entitled to longevity pay while on the retired list of the Navy. His claim was based upon sections 1556 and 1588 of the Revised Statutes, prescribing the pay of certain officers of the Navy.

Section 1556 provided that:

"The commissioned officers and warrant officers *on the active list* of the Navy of the United States, and the petty officers, seamen, ordinary seamen, firemen, coal-heavers, and employés in the Navy shall be entitled to receive annual pay at the rates herein stated after their respective designations: The Admiral, thirteen thousand dollars; * * *; Surgeons, Paymasters and Chief Engineers, who have the same rank with Paymasters during the first five years after date of commission, when at sea, two thousand eight hundred dollars; on shore duty, two thousand four hundred dollars; on leave, or waiting orders, two thousand dollars; during the second five years after such date, when at sea, three thousand two hundred dollars; on shore duty, two thousand eight hundred dollars; on leave, or waiting orders, two thousand four hundred dollars; during the third five years after such date, when at sea, three thousand five hundred dollars; on shore duty, three thousand two hundred dollars; on leave, or waiting orders, two thousand six hundred dollars; during the fourth five years after such date, when at sea, three thousand seven hundred dollars; on shore duty, three thousand six hundred dollars; on leave, or waiting orders, two thousand eight hundred dollars; after twenty years from such date, when at sea, four thousand two hundred dollars; on shore duty, four thousand dollars; on leave, or waiting orders, three thousand dollars."

Section 1588 provided that:

"The pay of all officers of the Navy who have been retired after forty-five years' service after reaching the age of sixteen years, or who have been or may be retired after forty-five years' service, upon their own application to the President, or on attaining the age of sixty-two years, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to seventy-five per centum of the sea pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement. The pay of all other officers on the retired list shall, when not on active duty, be equal to one-half of the sea pay provided by this

chapter for the grade or rank held by them respectively, at the time of their retirement."

The appellant Thornley contended that upon the proper construction of these two sections he was entitled to longevity pay, although a retired officer. The United States, on the other hand, contended that longevity pay is only given to officers on the active list of the Navy.

Says the court (on page 313):

"Where the meaning of a statute is plain it is the duty of the courts to enforce it according to its obvious terms. In such a case there is no necessity for construction. * * * Applying this rule, we are of the opinion that the case of the appellant finds no support in any act of Congress."

On page 314 the court further stated:

"The appellant seeks to find a reversal of this persistent policy of Congress, in respect to the pay of naval officers, in the expression found in section 1588 of the Revised Statutes, to wit: 'That the pay of all officers of the Navy, who have been retired * * * shall, when not on active duty, be equal to seventy-five per centum of the sea pay provided by this chapter for the grade or rank which they held respectively at the time of their retirement.'

"The contention is that by these words Congress intended to give, in this roundabout and indirect manner, longevity pay to the retired officers, which, when dealing directly with the subject, it had uniformly refused to give them. To our minds the section will bear no such construction. Its plain meaning is that the pay of a retired officer shall be three-fourths of the sea pay to which he was entitled when he was retired. It is contended that, because Congress graduated the pay of the officers on the active list by the length of their time of service, officers not on the active list are entitled to the same increase. But the contrary is the true construction. By omitting retired officers from the class entitled to longevity pay, Congress expressed its purpose not to allow them longevity pay. No other construction can be put upon the law without importing into it words which Congress has left out, namely, that besides the pay to which his grade or

rank at the date of his retirement entitled him, the retired officer should receive for every period of five years after his retirement, the increased pay allowed officers on the active list. To give the statute this meaning would be legislation and not interpretation."

Counsel for defendant there cited the case of the United States *vs.* Tyler (*supra*) as a precedent in his favor; but the court distinguished that case on the ground that section 1262 of the Revised Statutes did not restrict the increased pay to officers in *active* service, but that in the case before them the statute on which the appellant relied excluded him by its terms from its benefits.

In conclusion, the court said:

"We are not called upon to explain why Congress should apply one rule to officers of the Army and another to the officers of the Navy. It is sufficient to say that it has clearly done so. If the law is unequal and unjust, the remedy is with Congress and not with the courts."

Thornley *vs.* United States (*113 U. S. 310*).

It will be seen that in that case an officer of the Navy attempted to read into the statute that which would make it applicable to officers on the retired list; but the court held that the meaning of the statute was too plain to leave room for construction and excluded such an interpretation.

In the case at bar the defendant seeks to read into section 7 of the "Personnel act" that which would make the proviso relating to the pay of the nine lower numbers of the grade of Rear Admiral on the *active* list apply also to officers on the *retired* list who retired under the provisions of section 11, although not one word in the proviso or in section 7 or in any other section of the "Personnel act," as has been seen, extends the operation of the proviso to such retired officers.

The decision in the case of Thornley *vs.* United States (*supra*) should be conclusive of the question now at issue.

An officer of the Navy, Graham, was refused mileage at the rate prescribed by law for traveling outside of the United States, pursuant to a practice refusing such claims which had existed in the Navy Department for many years. By an act of Congress of 1835 it was provided:

"It is expressly declared that the yearly allowance provided for in this act is all the pay, compensation and allowance that shall be received under any circumstances whatever, by any such officer or person, except for traveling expense under orders, for which ten cents per mile shall be allowed."

Notwithstanding this act, there was a Navy regulation of 1865 providing that, for traveling outside of the United States, the actual expenses only of an officer should be allowed.

Considering the act of Congress just quoted, the court held (page 221):

"'The operative words in the act of 1876 are 'the sum of eight cents per mile shall be allowed.' In Temple's case it was said that the language of the act of 1876 was so clear and explicit as not to be open to construction, and to our minds the same is true of the act of 1835. Under both acts all traveling expenses are to be paid by mileage, and there is not in either of them any indication of an intention of Congress to make a distinction between travel by sea or on land, in foreign countries or in the United States. As was remarked by Mr. Justice Woods, 'The practice * * * finds no higher warrant or sanction in the act of 1835 than in the act of 1876.'

"Such being the case, it matters not what the practice of the departments may have been or how long continued, for it can only be resorted to in aid of interpretation, and it is not allowable to interpret what has no need of interpretation. If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. But with the language clear and precise, and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid. The

cases to this effect are numerous. Edwards' Lessee *vs.* Darby, 12 Wheat., 206; United States *vs.* Temple, *supra;* Swift Company *vs.* United States, 105 U. S., 691; Ruggles *vs.* Illinois, 108 U. S., 526."

United States *vs.* Graham (*119 U. S., 219*).

Here, again, the United States, as in the case at bar, attempted to ascribe to the act of Congress providing for mileage a meaning which it does not contain. Not even a long-continued practice of the Department nor a regulation of the Navy Department can inject that into a statute which is not to be found in it and is clearly absent from it.

See, also, the case of United States *vs.* Temple (*105 U. S., 97*), in which the court announced the same conclusion with reference to a similar act, saying:

"The statute and the finding of the Court of Claims leave little room for controversy. The law as it stood when the travel was performed was explicit, and is not open to construction. We find in it no warrant for the distinction made by the accounting officers of the Treasury between travel by sea and travel on land within the United States, performed by an officer of the Navy while engaged on public business. To hold that for one class of travel he should have eight cents per mile, and for the other his actual expenses, is to make the law and not to construe it."

In Farnsworth *vs.* Montana (*129 U. S., 104*) it was sought to have this court take jurisdiction of a criminal case on writ of error to the supreme court of the then Territory of Montana. The act of March 3, 1885 (*23 Stat., 443*), reads as follows:

"No appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars."

It was, of course, clear, that no jurisdiction attached by virtue of this clause; but section 2 provided:

"That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

It was claimed that this second section gave this court jurisdiction in criminal cases, because it was to be exercised where the validity of a statute of the United States was drawn in question, regardless of the sum or value in dispute; and there being the validity of a statute of the United States in dispute, jurisdiction must therefore attach.

But this court, construing this act, held that the words "in all such cases, an appeal or writ of error may be brought without regard to the sum or value in dispute" meant that the cases excepted by the second section from the operation of the first, must have *some* pecuniary matter in dispute, as was clearly implied by the language used. Said the court, in conclusion (page 113):

"It would have been easy for Congress to confer upon this court jurisdiction in criminal cases from the Territories, by plain and explicit language; and for the reason that no such jurisdiction exists by statute in the present case."

So we say that Congress could have very easily indicated its desire to give to the class of retiring Navy officers to which the appellant belongs, the pay of a Brigadier General, "by plain and explicit language." But instead of this, Congress used the unambiguous expression "three-fourths sea pay of the next higher *grade*," which is that of Rear Admiral, and the pay of which is fixed as that of a Major General.

As in the case last cited, the language "without regard to the sum or value in dispute" implied that there must nevertheless be at least a "sum or value," no matter how

small, in dispute, so in the case at bar, we submit, that the language of the *proviso* in section 7, "that each rear-admiral embraced in the nine lower numbers of *that grade* shall receive," &c., &c., implies that the *grade* itself and its rank and pay are unchanged, and is to be considered in its full effect in both capacities when referred to in another section of the same statute. That Congress so understood this is to be drawn from the language used in sections 8 and 9 of the act, as to which we make comment hereafter.

The most recent declaration of this court in which an attempt to change the clear wording of a statute so as to extort another meaning therefrom than that which the literal reading of the same expressed is to be found in the following case, decided in December, 1899.

In this case one of the questions involved depended upon the construction of the act of April 10, 1869, commonly called the "Married Women's act" as the same was reenacted in sections 727 to 730, both inclusive, in the Revised Statutes of the United States, relating to the District of Columbia. The two sections in the original act of 1869 read as follows:

"That in the District of Columbia the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were *femme sole*, and shall not be subject to the disposal of her husband, nor be liable for his debts; but such married women may convey, devise and bequeath *the same*, or any interest therein, in the same manner and with like effect as if she were unmarried."

"SEC. 2. *And be it further enacted*, That any married woman may contract, and sue and be sued in her own name, in all matters having relation to her sole and separate property in the same manner as if she were unmarried; but neither her husband nor his property shall be bound by any such contract nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole."

As re-enacted in the Revised Statutes they read thus:

"SEC. 727. In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts."

"SEC. 728. Any married woman may convey, devise and bequeath *her property*, or any interest therein, in the same manner and with like effect as if she were unmarried."

"SEC. 729. Neither the husband nor his property shall be bound in any such contract, made by a married woman nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were unmarried."

It was contended, on the part of counsel for the defendant in error, that the words "*her property*," in section 728 of the Revised Statutes, really meant all the property of a married woman *acquired in any other way than by gift from her husband*, because in the original act of 1869 the conveyances and devises of a married woman were limited to such property by the words "the same," referring to her property acquired otherwise than from her husband. Plaintiff in error, on the other hand, contended that the words "her property" were to be taken literally and included, therefore, all the property a woman might have, whether she acquired it by gift from her husband or otherwise.

Says the court on page 419:

"The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone

it is fairly susceptible of but one construction, that construction must be given it. (Heydon's case, 3 Fed. Rep. 76; United States *vs.* Freeman, 3 How. 556; Smythe *vs.* Fiske, 23 Wall. 374; Platt *vs.* Union Pacific Railroad Company, 99 U. S. 48; Thornley *vs.* United States, 113 U. S. 310; Viterbo *vs.* Frielander, 120 U. S. 707, 724; Lake County *vs.* Rollins, 130 U. S. 662; United States *vs.* Goldenberg, 168 U. S. 95.)"

The court also cited many cases and quoted from them which hold that where the meaning of a section of the Revised Statutes is clear, resort cannot be had to the statute which was revised in order to see whether or not Congress meant something different from what it said or erred in the revision of the statute. The court, therefore, held that the words in the revision "her property" meant what they said and included all a married woman's property, and that, therefore, a will devising property which had been given to a woman by her husband, the validity of which was a point in the case, was valid.

Hamilton *vs.* Rathbone (*175 U. S., 414*).

This last case is particularly applicable to the case at bar. It was urged by counsel for the defendant in error in that case that because the original "married women's act" of 1869 defined a married woman's separate estate so called, and later limited a married woman's power of disposition by will to her separate estate by the use of the words "the same," as in the act above set forth, there was strong ground for holding that where, in the revision of the "married women's act," after *defining* the married woman's separate estate in the same manner as the original act defined it, the *revised statute* used the words "*her property*" in giving a married woman the power of disposition by will, it must have meant her *said* property, to wit, her separate estate only—that is, that the words "her property" were equivalent to "the same."

Surely that was a much stronger ground for urging the court to construe that statute than is presented by the defendant's side of the case at bar as illustrated in the decision of the Comptroller of the Treasury and in that of the Court of Claims on the theory that because the rank of Commodore was abolished by the "Personnel act." therefore a pay grade for all Rear Admirals, whether on the active or retired list with the pay of a Brigadier General of the Army, was established. Yet this Court, in the Rathbone case, upheld the clear intent and meaning of the statute as expressed in its language; and we respectfully submit that such must be the case here, with the result necessarily in favor of the appellant. It may have been the intent of Congress, in establishing the special pay for the nine lower numbers of the grade of Rear Admiral, to thus compensate those officers who had become entitled to the rank of Rear Admiral by reason of the abolition of the rank of Commodore, with a pay less than that to be received by those who had gained nothing by the abolition of the Commodores, and had become Rear Admirals by reason of length of service, etc., at the time the "Personnel act" became a law.

Such possible intention was outlined by this Court in the case of Rodgers *vs.* United States (*185 U. S. 83–91*). Indeed, the Court of Claims, in its opinion, after quoting from its own opinion in the Rodgers case "That for the purpose of pay, a *distinction* is created by the act in the grade of Rear Admiral and special provision therefor" (Rec., p. 11), then proceeds to quote the following from the decision of this Court in the same case:

"The individuals thus raised in rank were not so raised on account of distinguished services or for any personal reason, but simply in consequence of the abolition of the official rank they had held. Is it unreasonable to believe that Congress thought it unwise to give to those officers (who had neither by length of service or by personal distinction become entitled to the position of rear-admiral, as it had stood in the past) all the benefits of such position?

Would it be unnatural for Congress to bear in mind those who, by length of service or by personal distinction, had already earned the position, and provide that in, at least, the matter of pay there should be some recognition of the fact? Again, is it unreasonable to believe that Congress intended that those officers whose past services placed them according to the prior relative rank side by side with brigadier generals of the Army should not, by a mere chance of statute, be given a benefit in salary which was not at the same time accorded to brigadier generals in the Army? May not this explain its action in so dividing the rear-admirals into two classes—one composed substantially of former rear-admirals, equal both in rank and pay with major generals in the Army, and of the other of those who in the past were only commodores, to whom was given the rank of rear-admirals but the pay of brigidier generals in the army?"

But is not this language distinctly in favor of the appellant?

Section 11 is applicable only to those officers *with a creditable record*, who served during the Civil War.

Have they not seen length of service? Have they not rendered themselves distinguished by the fact of their having served during the Civil War, and then remained for so many years in the Navy retiring with a creditable record? Does not the very explanation suggested by this Court in the language just quoted for the action of Congress in dividing the Rear Admirals into two classes, apply with equal force, in favor of the appellant, to the action of Congress in singling out the veterans of the Civil War, putting them in a class by themselves, and referring to them in a special section of the act, and, as we submit, giving *them* three-fourths of the sea pay of the next higher *grade*, as well as the rank? Is it not because these officers are veterans of the Civil War, and so distinguished for long service and merit that Congress intended they should have three-fourths the pay of a Major General and therefore omitted to retain the rank of Commodore on the retired list for the purposes of pay at least as it did in

sections 8 and 9, where no such peculiar services and distinction are referred to?

Turning to sections 8 and 9 of the Personnel act we find that in section 8, referring to voluntary retirement, the applicant, when placed on the retired list by the President, is to receive the rank and three-fourths the sea pay of the next higher grade "as now existing, including the grade of Commodore," and in section 9, which provides for the involuntary retirement by a certain board to be convened by the Secretary of the Navy for the purpose of selecting officers to retire, in naming the compensation of the officers retired under this section, it is enacted that "he shall be retired with the rank and three-fourths the sea pay of the next higher grade, *including the grade of Commodore, which is retained on the retired list for this purpose;*" thereby especially providing for those retiring with the rank of Captain on the active list.

If, then, the contention of the Comptroller of the Treasury is correct, why should sections 8 and 9 of the "Personnel act" contain the words "including the grade of Commodore"? And, again, if Congress had, as the defendant contends, intended that the grade of Admiral should be divided into two *so-called pay grades*, why should Congress not have expressed itself practically to that effect as clearly in section 11 as in section 9 by inserting the words "including the grade of Commodore, which is hereby retained on the retired list for that purpose"? Or if the *rank* only of Rear Admiral was to be given to those retiring under section 11, why could not the words "including the grade of Commodore, which is hereby retained on the retired list for the purpose of pay only," be used, or some other words of similar import? Having omitted such or similar language from section 11, after inserting them in sections 8 and 9, it is plain that Congress intended that officers retiring by virtue of section 11 should receive three-fourths of the sea pay of the *grade* of Rear Admiral; and this plain intention is sought to be frustrated by the attempt of the defendant substantially

to read into section 11 the words contained in section 9 above quoted by applying to officers retiring under section 11 the proviso in section 7 with reference to the nine lower numbers of the grade of Rear Admiral. That the defendant cannot do this, it seems to us, has been clearly shown by the foregoing authorities.

In this connection it will be observed that while the court below refers to the above contention made in respect of these sections 8 and 9, it omits to make any substantial reply thereto.

For the above reasons, it is respectfully submitted that the judgment of the Court of Claims should be reversed.

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